No. 83-614

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SECURITIES INDUSTRY ASSOCIATION,
Petitioner,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF RESPONDENT BANKAMERICA CORPORATION

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QUESTIONS PRESENTED

Petitioner challenges a decision of the United States Court of Appeals for the Second Circuit upholding a ruling by the Federal Reserve Board which permitted a bank holding company to acquire a securities brokerage firm that is engaged principally in buying and selling securities on the order and for the account of its customers. The questions presented are:

1. Whether the Court of Appeals correctly upheld the Board's judgment that the activities of the brokerage firm are "closely related to banking" within the meaning of section 4(c)(8) of the Bank Holding Company Act.

2. Whether the Court of Appeals correctly upheld the Board's interpretation that section 20 of the Glass-Steagall Act does not prohibit affiliation between the holding company and the brokerage firm.

RULE 28.1 STATEMENT

Respondent BankAmerica Corporation owns, directly or indirectly, more than 50 percent but less than 100 percent of the voting stock of the following:

Decimus Corporation
Decimus Computer Leasing Corporation
Banca d'America e d'Italia

BAI Leasing Venture
Finabai-Societe Financiere S.A.
BAI Bank (Cayman) Ltd.

BA Australia Limited

Bamerical Investments (Australia) Limited
Bamerical Nominess (Australia) Proprietary Ltd.

BA (Australia) Holding Proprietary, Ltd.
BA Investors Mgt. Ltd.
BA Australia Leasing Ltd.
Bamerical Proprietary Ltd.
BA (Australia) Hong Kong Ltd.

BancAmerica Options, Inc.
Bank of America Cameroon
BankAmerica Representaco e Servicios Ltd.
Commercial Bank of Africa

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STATUTES INVOLVED

This action involves section 4(c)(8) of the Bank Holding Company Act, 12 U.S.C. § 1843(c)(8) (1982), and section 20 of the Glass-Steagall Act, 12 U.S.C. § 377 (1982). Response to petitioner's arguments also requires consideration of sections 16, 21, and 32 of the Glass-Steagall Act, 12 U.S.C. §§ 24 (Seventh), 378, 78 (1982). With the exception of section 32 of the Glass-Steagall Act, the relevant portions of these statutes are set forth

in petitioner's brief. (Petitioner's Br. at 2-3.) Section 32, in pertinent part, prohibits officer, director, or employee interlocks between any member bank of the Federal Reserve System and any entity

> "primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities." [1]

STATEMENT OF THE CASE

The Statement of the Case in the Brief filed on behalf of the Federal Reserve Board ("Board") and other federal respondents sets forth the background of this case and the history of the proceedings. BankAmerica Corporation ("BankAmerica") adopts that Statement as supplemented below to show that for many years banks and their affiliated companies have engaged in securities brokerage activities pursuant to longstanding regulatory policies which Congress has expressly considered and declined to change.[2]

Before the enactment of banking and securities legislation in the 1930's, both state and national banks were extensively involved in securities activities. Many of these activities continued after passage of that legislation. As the Securities and Exchange Commission ("SEC") reported in 1977:

> "Banks historically have played a major role in securities activities and the securities markets. While the permissible range of bank securities activities was circumscribed by passage of the Glass-Steagall Act in 1933, that Act did not separate the

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[1] 12 U.S.C. § 78.

[2] This case deals with the extent to which nonbank subsidiaries of bank holding companies may provide brokerage services. The activities of banks are relevant because section 4(c)(8) of the Bank Holding Company Act requires the Board to determine whether those services are closely related to banking.

> business of commercial banking from all aspects of the securities business. Banks act as underwriters of, and dealers in, U.S. government and municipal securities, manage the investments of others as trustee and agent, and are actively involved in the handling of securities and in the settlement of securities transactions for broker-dealers, institutional customers and others." [3]

Bank securities activities have always involved the provision of brokerage services.[4] For a period of time beginning in the mid-1930's, banks generally did not promote those services to the public—no doubt in part due to early restrictive rulings by the Comptroller of the Currency which discouraged national banks from soliciting brokerage customers.[5] As the Administrative Law Judge found in the Recommended Decision adopted by the Board (21A-23A; 80A; 126A),[6] however, the primary reason that banks did not promote their brokerage services was the existence of stock exchange rules that both fixed brokerage commissions[7] and effectively excluded

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[3] Staff of Senate Comm. on Banking, Housing and Urban Affairs, 95th Cong., 1st Sess., *Reports on Bank Securities Activities of the SEC* 1 (Comm. Print. 1977) (*"Bank Report"*).

[4] *See, e.g., id.* at 1-2. In addition to the activities mentioned above, bank brokerage services have included "dividend reinvestment plans, employee stock purchase plans, automatic customer purchase plans, and customer transaction services." *Id.*

[5] *See* 1 *Bulletin of the Comptroller of the Currency*, No. 2, at 2 (Oct. 26, 1936), discussed in text at 37 *infra*.

[6] Citations to material printed in the Joint Appendix appear as "—A."

[7] From its inception in 1792, the New York Stock Exchange zealously policed a price-fixing cartel, requiring its member firms to charge their customers commissions that were in compliance with the Exchange's commission rate schedule. *See, e.g.*, Former NYSE Rule 383. *See generally*, Baxter, *NYSE Fixed Commission Rates: A Private Cartel Goes Public*, 22 Stan. L. Rev. 675, 676 (1970). At

banks from membership on major exchanges.[8] With no way to execute trades for listed securities except by paying fixed commissions to traditional brokerage houses like

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the insistence of the SEC, the E..change began to relax its price-fixing restrictions in the early 1970's, *see* note 10 *infra*, and by May 1975 the practice had been eliminated. *See* SEC Securities Exchange Act Release No. 10383, [1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 79,511 (Sept. 11, 1973); SEC Securities Exchange Act Release No. 10206, [1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 79,391 (June 6, 1973). Congress subsequently ratified the SEC's action. *See* Securities Act Amendments of 1975, 15 U.S.C. § 78f(e)(1) (1982) (providing that "no national securities exchange may impose any schedule or fix rates of commissions . . . or other fees to be charged by its members . . . .").

[8] Some exchanges had (and continue to have) express rules excluding banks from membership (*e.g.*, Article XIII, § 13-3 of the Philadelphia-Baltimore-Washington Stock Exchange Guide (CCH) ¶ 1303). The New York Stock Exchange rules accomplished the same result indirectly. Before 1959, the New York Stock Exchange rules flatly prohibited publicly held corporations, the organizational form of most banks, from acquiring membership status. *See generally* Staff of the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs, 93d Cong., 1st Sess., *Securities Industry Study* 69 (Comm. Print 1973). In 1959, the New York Stock Exchange enacted former Rule 318.12 which permitted publicly held corporations to become members, but only if the primary purpose of that corporation or its parent company (if any) was "the transaction of business as a broker-dealer in securities," a test that had the purpose and effect of excluding institutions such as banks. Section 6(b)(2) of the Securities Act Amendments of 1975 removed the ban on institutional membership provided in former Rule 318.12 by requiring that the rules of national stock exchanges provide, subject to certain exceptions, "that any registered broker or dealer . . . may become a member of such exchange and any person may become associated with a member thereof." 15 U.S.C. § 78f(2) (1982). In 1976, the New York Stock Exchange proposed a rule which would have expressly barred banks and bank affiliates from membership. *See* SEC Securities Exchange Act Release No. 12737, 10 SEC Docket 272 (Aug. 25, 1976). The SEC declined to approve the proposed rule, however, largely on the ground that it was anti-competitive and thus inconsistent with Congress' intent to remove the marketplace impediments it earlier had found to permeate various aspects of the securities industry. *Id.* at 278-79.

petitioner's members, banks were unable to offer widespread brokerage services at competitive prices and therefore could not compete for much of that business.

The changing national policy which phased out fixed brokerage commissions during the 1970's made possible expanded brokerage by banking institutions.[9] (23A.) Almost immediately after the initial unfixing of brokerage commissions on institutional transactions in 1971,[10] banks began to promote and solicit customers for automatic investment plans, competing with traditional brokerage houses and passing along the lower commissions made possible by combining their customers' individual orders into larger transactions that could be executed at lower rates.[11] When brokerage commissions on all trades were unfixed in 1975, new low-commission "discount" brokers such as Charles Schwab & Company, Inc. ("Schwab") began to emerge.[12] (23A; 17A.) These

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[9] *See* notes 7 & 8 *supra*.

[10] SEC Securities Exchange Act Release No. 9079, [1970-1971 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,955 (Feb. 11, 1971) (requiring that commissions on transactions over $500,000 be fixed by negotiation between the customer and brokerage house as of April 1, 1971).

[11] *See New York Stock Exchange v. Smith*, 404 F. Supp. 1091, 1093 n.1 (D.D.C. 1975), *vacated on other grounds sub nom. New York Stock Exchange v. Bloom*, 562 F.2d 736 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 942 (1978). Under automatic investment plans, banks provided lists of corporations to their customers and then periodically purchased for them shares of stock of the companies selected by the customers. Payment was effected by debiting the customer's checking account. *Id.* at 1092-93.

[12] Schwab and firms that engage in similar activities differ from full-service brokerage firms primarily because—unlike such full-service firms—they generally do not provide investment advice or analysis, nor do they engage in underwriting or market-making for corporate stocks and bonds. Discount brokers rely on the volume of the transactions they execute rather than customized service for their profitability. Typically, the commissions they charge for the

brokers included Chemical Bank of New York which introduced (and subsequently terminated) what was apparently the first program of bank "discount" brokerage services in competition with petitioner's traditional brokerage house members.[13]

More recently, changes in technology and consumer demand have made it possible, as well as commercially attractive, to offer brokerage as part of a package of financial services, including integrated and interest-bearing brokerage/cash accounts with credit or debit card privileges and check writing access. (36A-38A; 130A-131A.) These changes coupled with the profit opportunities resulting from the unfixing of commissions provided banks with increasing incentives to expand their brokerage activities. Responding to those incentives, BankAmerica announced in late 1981 that it intended to apply to the Board for authority to acquire Schwab.[14] Shortly thereafter, Security Pacific National Bank began promoting its version of "discount" brokerage,[15] and other banking institutions have followed suit.[16]

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transactions they execute are significantly lower than those charged by full-service firms, and they are thus referred to as "discount" brokers. (127A.) *See* Note, *A Banker's Adventures in Brokerland: Looking Through Glass-Steagall at Discount Brokerage Services*, 81 Mich. L. Rev. 1498, 1498-99 (1983).

[13] *See* Clark & Saunders, *Glass-Steagall Revised: The Impact on Banks, Capital Markets, and the Small Investor*, 97 Banking L.J. 811, 829-31 (1980).

[14] BankAmerica sought to acquire directly The Charles Schwab Corporation and thereby acquire its wholly owned subsidiary, Schwab. (125A.)

[15] *See Security Pacific Nat'l Bank*, [1982-1983 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 99,284 (O.C.C. Aug. 26, 1982), *aff'd in part sub nom. Securities Indus. Ass'n v. Comptroller of the Currency*, 577 F. Supp. 252 (D.D.C. 1983), *cross appeals pending*, Nos. 84-5026 and 84-5085 (D.C. Cir. 1984).

[16] *See* Note, *Discount Brokerage*, 81 Mich. L. Rev., at 1499-1500 & n.9. According to petitioner (Petitioner's Br. at 4-5), its members

The bank regulatory agencies, recognizing the public benefits, generally supported these efforts. That support represents a continuation of regulatory policy based on longstanding administrative practice and interpretation of governing statutory standards. Specifically, the Glass-Steagall Act since its inception has expressly authorized national banks to provide brokerage services. 12 U.S.C. § 24 (Seventh). The Comptroller, whose early rulings limited the offering of such services, had relaxed his rulings well before the decision in 1974 upholding the right of national banks to promote expanded brokerage services through automatic investment plans.[17] The Board, as the agency primarily responsible for enforcing major provisions of the Act, has never construed the Act to prohibit brokerage by bank holding companies or their nonbank affiliates and has long interpreted relevant terms in the Act to permit brokerage activities.[18]

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are today feeling the effects of competition from more than 600 depository institutions that have commenced promoting "discount" brokerage services in one form or another. *See* Wall St. J., Mar. 7, 1983, at 20, col. 2. Petitioner errs, however, by placing all depository institutions in the same category as banks. Significantly, federal savings and loan associations are regulated by the Federal Home Loan Bank Board ("FHLBB") and the Federal Savings and Loan Insurance Corporation and are not subject to the Glass-Steagall Act. *See* 12 U.S.C. §§ 1464(a), 1725-30 (1982). The monitoring of the FHLBB referred to in petitioner's brief (Petitioner Br. at 6) came in the context of Congress having recently considered exhaustive new legislation pertaining to those associations and, in any event, does not refer directly or indirectly to brokerage activities. *See* Thrift Institutions Restructuring Act, Pub. L. No. 97-320, Title III, 96 Stat. 1469, 1496 (1982). Nonmember state banks are similarly in a different posture since they are subject only to section 21 of the Glass-Steagall Act. Because they are not subject to section 20—the part of the Glass-Steagall Act at issue here—nothing in that Act prohibits them from being affiliated even with underwriting firms.

[17] *See* text at 37 & note 80 *infra*.

[18] *See* 22 Fed. Res. Bull. 51 (1936), discussed in text at 28 *infra*.

Beginning in the early 1970's and continuing to the present, Congress has been well aware of bank securities activities and the actions of the bank regulatory agencies. Changes in the capital markets, including the abandonment of fixed commissions, have commanded major congressional attention, part of which has been focused on brokerage.[19] For example, throughout the period Congress has considered whether increasing bank brokerage activity warranted bringing banks within the jurisdiction of the SEC under the Securities Exchange Act of 1934, or whether it was preferable to have regulation remain at the banking agencies.[20] Congress has also con-

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[19] In 1973, for example, Senator Brooke introduced legislation addressed to the provision of brokerage services by banks in the form of automatic investment plans which he noted were being "aggressively marketed" to the public. 119 Cong. Rec. 37,213 (1973). *See also Securities Activities of Commercial Banks: Hearings on the Expansion of Commercial Banks' Securities Business Operations and the Elimination of Barriers Between the Banking and Securities Industries Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 1st Sess. 145, 167-68 (1975) (statement of Roderick M. Hills, Chairman, SEC) ("banks offer to the public many services comparable to the services offered by brokers"); *Brokerage and Related Commercial Bank Services: Hearings Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. 1 (1976) ("This week's hearings will focus on the brokerage and brokerage-related services commercial banks . . . are providing to investors.").

[20] In 1975, Congress directed the SEC to study and report on the securities activities of banks and to determine whether they should be subject to additional regulation. 15 U.S.C. § 78(a)(1)(E) (1982). In its 1977 Reports to Congress in response to this directive, the SEC acknowledged the "major role in securities activities and securities market" played by banks, *Bank Report* at 1, but advised against subjecting banks to SEC regulation, *id.* at 305. The SEC did, however, recommend legislation intended to strengthen the regulatory scheme administered by the banking agencies. *Id.* at 307-08. The SEC is now considering proposed Rule 3b-9 which, if promulgated, would subject banks to regulation as broker/dealers under the Securities Exchange Act of 1934. *See* SEC Securities Exchange Act Release No. 20357, 48 Fed. Reg. 51,930 (1983).

sidered legislative proposals designed explicitly to modify the language of section 4(c)(8) of the Bank Holding Company Act in ways that would have affected the brokerage activities of holding companies and their nonbank affiliates. Some of these proposals dealt directly with the "closely related" standard;[21] including one, "strongly endorsed" by petitioner's members (who complained about the brokerage activities of Chemical Bank and others),[22] that would also have expressly prohibited affiliates from soliciting "the purchase or sale of any security."[23]

During this time, Congress has revised other aspects of the banking laws, including those dealing directly with bank holding companies. In the Garn-St Germain Act[24] passed in 1982 (well after BankAmerica's application to acquire Schwab was filed and after the Comptroller's

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[21] *E.g.*, H.R. 2856, § 6(a), 96th Cong., 1st Sess. (1979); S. 39, § 301(a), 96th Cong., 1st Sess. (1979); S. 72, § 301(a), 95th Cong., 1st Sess. (1977); S. 2721, § 301(a), 94th Cong., 1st Sess. (1975). *See* note 45 *infra*.

[22] *Bank Holding Company Legislation and Related Issues: Hearings on H.R. 2747 Before the Subcomm. on Financial Institutions of the House Comm. on Banking, Finance and Urban Affairs*, 96th Cong., 1st Sess. 908 (1979) (statement of John F. Donahue, Jr.).

[23] H.R. 2747, § 8, 96th Cong., 1st Sess. (1979) (proposing to amend section 4(c)(8) to provide that "it is not closely related to banking to . . . underwrite, distribute, or solicit the purchase or sale of any security").

A number of bills have been introduced recently proposing to amend section 4(c)(8) to permit bank holding companies to engage in "services of a financial nature" and to require that certain securities activities (including brokerage) be carried out in separate securities affiliates. *See, e.g.*, S. 2181, § 104(d), 98th Cong., 1st Sess. (1983); S. 1609, § 10, 98th Cong., 1st Sess. (1983); S. 2490, §§ 8, 10, 97th Cong., 2d Sess. (1982); H.R. 6720, §§ 8, 10, 97th Cong., 2d Sess. (1982). *See also* S. 2134, § 5, 98th Cong., 1st Sess. (1983).

[24] Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, Title VI, 96 Stat. 1469.

ruling that national banks may engage in "discount" brokerage), section 4(c)(8) was amended expressly to limit insurance activities. But during the entire period, Congress has never acted to limit securities brokerage activities.

SUMMARY OF ARGUMENT

Section 4(c)(8) of the Bank Holding Company Act authorizes the Board to allow a bank holding company to engage in nonbanking activities if the Board determines that the activity is "so closely related to banking as to be a proper incident thereto" and that the holding company's activity may reasonably be expected to produce public benefits. The Board concluded that the activities involved in this case—acting as agent in arranging for the purchase and sale of securities on the order of and for the account of customers—satisfied the requirements of section 4(c)(8), and the court below affirmed. Petitioner claims error, arguing first that the Board employed an inappropriate standard in determining that the activities were closely related to banking and second that the Glass-Steagall Act prohibits the holding company from engaging in brokerage.

I

The Bank Holding Company Act confers substantial discretion upon the Board in determining whether the relationship between a proposed section 4(c)(8) activity and banking is "close." The statute does not prescribe the precise factors the Board is to consider. Rather, the Act and its legislative history make clear that the Board should apply its expertise and experience in determining whether the relationship is a close one. This Court has ruled that Board determinations under section 4(c)(8) are "entitled to the greatest deference." *Board of Governors v. Investment Company Institute* (*"ICI II"*), 450 U.S. 46, 56 (1981).

The Board applied its expertise in this case to a record that plumbed in depth the activities of banks and brokers in performing brokerage functions. The Board found that banks have provided a variety of brokerage services and have routinely engaged in arranging for the purchase and sale of securities for the account of customers; that bank activities and the brokerage services offered by Schwab, while differing in minor respects, are "operationally and functionally very similar"; and that banks are particularly well equipped with technology and personnel to offer these services. Those findings articulate a wholly rational basis for concluding that the brokerage services at issue are closely related to banking.

Petitioner argues that it was improper for the Board to consider the "functional similarity" between the services provided by banks and brokers and that a nonbanking activity can be "closely related" to banking only if it "facilitates" other banking services. Petitioner's arguments are not supported by the statutory language or legislative history. They are wholly inconsistent with this Court's decision in *ICI II*. They conflict with the approach consistently followed by the Board and by every court of appeals that has considered the statute. The court below properly rejected them, and its holding that the Board acted well within its discretion should be affirmed.

II

The Glass-Steagall Act governs the securities activities of national banks on the one hand and their affiliates on the other. Section 20 of the Act is the only provision relevant here. It prohibits banks from affiliating with a company engaged "principally" in the "issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndication," of securities—statutory language that this Court has said refers to the "underwriting field" and which the Board's regulations have interpreted since 1936 as excluding brokerage.

Petitioner challenges the Board's longstanding interpretation of the Act and argues that the words "public sale" in section 20 should be read to include brokerage. However, as the court below held, the Board's reading gives the words of the statute their natural meaning, is supported by well established principles of statutory construction, and is in full accord with the purposes of the Act. Brokerage activities do not present the risks that concerned Congress when it passed the Act.

Petitioner argues that section 16 of the Glass-Steagall Act—the section that governs the securities activities of national banks, not their affiliates—limits the brokerage services that banks can offer and that a "consistent reading" of the Act requires that these limitations be read into section 20 as well. Section 16 does not so limit banks. In any event, this Court has already held that the Glass-Steagall Act permits bank affiliates to engage in securities activities prohibited to banks. *ICI II*, 450 U.S. at 60. The court below correctly concluded that even if banks were limited in the brokerage services they may provide, the Act does not and was not intended to impose such limitations on bank affiliates.

ARGUMENT

I. THE BOARD PROPERLY DETERMINED THAT SECURITIES BROKERAGE IS CLOSELY RELATED TO BANKING.

The activities of bank holding companies and their nonbank subsidiaries are governed by the Bank Holding Company Act. The Act generally prohibits bank holding companies from engaging in nonbanking activities but sets forth certain specific exceptions. One of those exceptions is found in section 4(c)(8), which provides that bank holding companies and their nonbank affiliates may engage in activities which the Federal Reserve Board finds are "so closely related to banking . . . as to be a proper incident thereto." 12 U.S.C. § 1843(c)(8). In considering whether a proposed activity is "proper" for a particular bank holding company, the Board is in-

structed to weigh the public benefits of the activity, taking into account factors such as public convenience, efficiency, increased competition, and effects on sound banking practice. *Id.*

In this case, the Board considered whether BankAmerica's acquisition of Schwab would satisfy the requirements of section 4(c)(8). Schwab is engaged in arranging securities transactions for its customers. (127A; 17A-19A.) Its principal activity is pure brokerage—*i.e.*, it arranges for the purchase and sale of securities solely as agent, on the order and for the account of customers. (127A; 18A.)[26] The Board found a wide array of public benefits attendant upon BankAmerica's offering brokerage services through Schwab. (134A-136A; 146A.) That finding is uncontested. The Board also concluded that the undisputed facts of record demonstrated that these services were "closely related" to banking. (128A-133A.)

The Board relied upon three principal factors in concluding that the brokerage services that BankAmerica would provide after acquiring Schwab are "closely related" to banking:

> 1. The Board first looked at the extent to which banks have performed brokerage services. The principal activity of a broker is to arrange the purchase or sale of securities for customers. (31A.) Banks have engaged in this type of activity for decades. (129A; 25A-34A.) The Board found that through the trading desks of trust departments, "banks routinely buy and sell securities" for the account of customers. (129A; 25A-34A.) Moreover, banks engage extensively in effecting securities transactions in municipal and government securities and have

[26] Schwab also offers incidental supporting services such as margin lending, custodial accounts, and appropriate account maintenance. (127A.) The Board examined these services and found them to be closely related to banking. Petitioner did not question the Board's conclusions in this respect in the court below and does not challenge them now.

offered other programs to the public for direct customer brokerage service. (129A; 27A-28A.)[26]

2. The Board next examined the precise ways in which banks and brokerage firms deal with securities transactions and found that they were "operationally and functionally very similar." (129A.) In engaging in securities activities, banks perform the same functions, utilize the same techniques, employ persons with the same training, and use the same facilities as brokers. (129A-131A.) The Board also examined petitioner's contention that banks historically have been excluded from stock exchanges and therefore have not executed transactions in listed securities on the exchange floors. Here it found that banks executed many other types of securities transactions and that, even where banks used an intervening broker for exchange execution, their role has often been so substantial as to leave the intervening floor broker only a ministerial task. (129A-130A.)[27]

3. Finally, the Board specifically considered the extent to which banking organizations were able to deal with the technological demands inherent in offering brokerage services. Here it found that the use of sophisticated techniques, resources, and personnel to execute orders for the purchase or sale of securities for the account of customers is sufficiently widespread in the banking industry to justify the conclusion that banking organizations are particularly well equipped to offer this type of service. (129A; 130A-131A.)

The court below held that the Board's factual findings were "clearly" supported by substantial evidence and that the tests it applied were reasonable and well within its discretion. (172A-174A.)

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[26] The record also contains documentation of BankAmerica's own extensive activity in the brokerage field. (34A-36A.)

[27] The Board also found that many brokers utilize floor brokers for the formal execution of listed securities. Schwab itself until recently used an intervening broker for floor execution on the New York Stock Exchange. (17A; 32A.)

Petitioner assumes that the securities brokerage business is not an activity in which banks themselves may engage. (Petitioner's Br. at 15.) Petitioner then argues that the Board could not properly find that brokerage is "closely related" to banking unless it specifically determined that brokerage directly and significantly "facilitates" other banking activities. (Petitioner's Br. at 13, 15.)[28] Petitioner argues that the Board was in error because it made no such finding here. Rather, petitioner contends that the Board rested its determination solely upon the "functional similarity" between brokerage and banking and, in so doing, applied a test which Congress rejected in the 1970 Amendments to the Bank Holding Company Act.[29] (Petitioner's Br. at 15, 18.) Petitioner's

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[28] Petitioner's facilitation argument derives in part from a statement of former Board Chairman Martin that petitioner presents out of context. (Petitioner's Br. at 13-14.) Chairman Martin testified that:

> "On the basis of the language of the statute and its legislative history, the Board has interpreted the section 4(c)(8) exemption to mean that there must be a direct and significant connection between the proposed activities of the company to be acquired and the business of banking, or of managing and controlling banks, *as conducted by the bank holding company or its banking subsidiaries.*"

Bank Holding Company Act Amendments: Hearings on H.R. 6778 Before the House Committee on Banking and Currency, 91st Cong., 1st Sess. 199 (1969) (emphasis added as to portion omitted by petitioner). The statement was designed to persuade Congress to permit bank holding companies "to engage in 'related' activities without showing such a close connection between the business and that of a subsidiary bank." *Id.* Congress ultimately agreed and deleted the requirement. *See* text at 20 *infra*.

[29] Petitioner's argument that the Board applied a test solely of functional similarity is based on misquotation of the Board's order (Petitioner's Br. 15). The Board found that the brokerage business is "*operationally and functionally very similar*" to the brokerage activities of banks, and relied on other factors as well. *See* text at 13-14 *supra*.

contentions have already been rejected by this Court; they violate the language and the intent of the Bank Holding Company Act; and they proceed, in any event, upon the erroneous assumption that securities brokerage is not itself a banking activity that is *a fortiori* closely related to banking.

First, this Court disposed of petitioner's contentions just three years ago in *ICI II*, 450 U.S. 46. There this Court upheld the Board's determination that the activity of sponsoring, managing, and advising a closed-end investment company was closely related to banking. This Court did not require that the Board find that the activity "facilitated" other banking operations. (As the court below noted, the activity clearly did not.) (174A.) Nor did this Court believe that the Board had erred in examining the similarity between the functions traditionally performed by banks and the activity which the Board approved. Rather, relying precisely upon the similarity of function, this Court reasoned that:

> "The services of an investment adviser are not significantly different from the traditional fiduciary functions of banks. The principal activity of an investment adviser is to manage the investment portfolio of its advisee—to invest and reinvest the funds of the client. Banks have engaged in that sort of activity for decades. As executor, trustee, or managing agent of funds committed to its custody, a bank regularly buys and sells securities for its customers. Bank trust departments manage employee benefit trusts, institutional and corporate agency accounts, and personal trust and agency accounts. Moreover, for over 50 years banks have performed these tasks for trust funds consisting of commingled funds of customers. . . . The Board's conclusion that the services performed by an investment advisor are "so closely related to banking . . . as to be a proper incident thereto" is therefore supported by banking

practice and by a normal reading of the language of § 4(c)(8)."[30]

Second, the language of the Act itself refutes petitioner's claims. That language instructs the Board to consider the "closeness" of an activity to banking. It does not say that the Board must find that the activity "facilitates" other banking operations. Much less does it suggest that "facilitation" is an exclusive test which the Board must employ or that functional similarity may not be considered as a factor by the Board.[31] Rather, the language is general in nature. It does not specify the factors which the Board should examine,[32] nor the weight to be accorded the factors that the Board takes into account. Any normal reading of the statute would suggest that the Board has discretion to consider and

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[30] 450 U.S. at 55-56 (citations omitted). Petitioner notes (Petitioner's Br. at 16) the language in *ICI II* to the effect that:

> "Because the authority for any specific investment advisory relationship must be preceded by a further determination by the Board that the relationship can be expected to provide benefits for the public, the Board will have the opportunity to ensure that no bank holding company exceeds the bounds of a bank's traditional fiduciary function of managing customers' accounts."

450 U.S. at 57. Here the Board exercised that opportunity and found that Schwab's activities (which the Board found not to be significantly different from the brokerage activities of banks) would provide substantial public benefits. (184A-186A; 129A.) Petitioner does not contest the Board's public benefits determination.

[31] The Board's ruling does not create a precedent for banks to engage in the retail consumer sale of goods business or the telephone business. (Petitioner's Br. at 18-19.) The Board would consider functional similarity as one factor in evaluating the relationships of these activities to banking activities, just as it did in analyzing the brokerage business here.

[32] In contrast, Congress specified a number of factors for the Board to consider in making the public benefits determination of section 4(c)(8). 12 U.S.C. § 1843(c)(8).

weigh a variety of factors. Both the Board and every court that has examined the statute have so held.[23]

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[23] *See National Courier Ass'n v. Board of Governors*, 516 F.2d 1229 (D.C. Cir. 1975), where the court specified three factors that the Board may properly consider, namely whether:

> "1. Banks generally have in fact provided the proposed services.
>
> 2. Banks generally provide services that are operationally or functionally so similar to the proposed services as to equip them particularly well to provide the proposed service.
>
> 3. Banks generally provide services that are so integrally related to the proposed services as to require their provision in a specialized form."

Id. at 1237. Those factors have been adopted both by the Board and by all of the courts of appeal that have considered the question. (128A; 171A.) *See Alabama Ass'n of Insurance Agents v. Board of Governors*, 533 F.2d 224, 241 (5th Cir. 1976), *modified*, 558 F.2d 729 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978); *Association of Bank Travel Bureaus, Inc. v. Board of Governors*, 568 F.2d 549, 551 (7th Cir. 1978); *NCNB Corp. v. Board of Governors*, 599 F.2d 609, 613 (4th Cir. 1979). Moreover, the court in *National Courier* stressed that the Board should examine the whole nexus between an activity and banking. 516 F.2d at 1237. Indeed, *National Courier* squarely rejected petitioner's view of the closely related determination by approving the activity of transportation of financially related materials for the general public as closely related to banking. *Id.* at 1239.

While petitioner relies heavily on *Alabama Association* in support of its facilitation argument, that case not only embraced the *National Courier* factors but acknowledged as well the need to look at the broad nexus between an activity and banking. *Alabama Ass'n*, 533 F.2d at 240-41, *as modified*, 558 F.2d at 730. *Alabama Association* did approve certain activities (such as insurance on loan collateral) because they facilitated bank loan operations. 533 F.2d at 240. But the court plainly did not view facilitation as a mandatory requirement; it was only one of a number of relationships the court considered in making the "closely related" inquiry. With regard to other insurance activities, the court noted that the Board had not made sufficient factual findings to support a close relationship between them and banking. *Id.* at 241. On rehearing and upon a more complete factual showing by the Board, the court

Third, the legislative history of the 1970 Amendments to the Bank Holding Company Act precludes petitioner's arguments. This Court has previously examined that history and concluded that it is difficult to discern the precise metes and bounds of the "closely related" test. *ICI II*, 450 U.S. at 56 n.20. But there is no doubt about one choice made by Congress in the 1970 Amendments to the Act. Congress deliberately chose to retain the general language of the Act which, on its face, permits the Board to consider and weigh a variety of factors in determining whether an activity is closely related to banking.[34] It did so despite strenuous efforts in the House to encumber the Board's discretion.[35] Indeed, in recognition of the broad discretion invested in the Board under the "closely related" determination, Congress added a public benefits test to require that the Board address a number of other factors in each individual case before authorizing a bank holding company to engage in a specific activity.[36]

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reversed itself in part and upheld the Board's conclusion that selling insurance in communities with less than 5,000 population is closely related to banking. 558 F.2d at 730.

[34] In *ICI II*, this Court quoted extensively from the legislative history in showing that Congress intended that the Board have considerable flexibility in making the closely related determination. 450 U.S. at 56-57 & n.23.

[35] The House bill was amended on the floor to include a "laundry list" of specific types of business activities that would be prohibited to bank holding companies. 115 Cong. Rec. 33,133, 33,139 (1969). The addition of this list occasioned a bitter fight on the floor with opponents arguing that it was essential to leave the Board's discretion untrammelled. 115 Cong. Rec. 33,135 (1969) (remarks of Rep. Rees); *id.*, at 33,137 (remarks of Rep. Brown); *id.* at 33,138-39 (remarks of Rep. Ashley). When the Bill finally emerged from Conference the laundry list was deleted and the views of those favoring a flexible discretionary approach prevailed. H.R. Conf. Rep. No. 1747, 91st Cong., 2d Sess. 13 (1970).

[36] 115 Cong. Rec. 33,139, 33,140 (1969); H.R. Rep. No. 387, 91st Cong., 1st Sess. 14-15 (1969); S. Rep. No. 1084, 91st Cong., 2d Sess. 13-14 (1970); H.R. Conf. Rep. No. 1747, 91st Cong., 2d Sess. 16-18 (1970).

The 1970 Amendments also expanded the permissible activities of bank holding companies. As noted by this Court:

> "The 1956 version had required a close connection to the 'business of banking.' The 1970 Amendments required only a close connection to 'banking.' This change eliminated the requirement that bank holding companies show a close connection between a proposed activity and an activity in which the holding company or its subsidiary already actually engaged. Thus the 1970 amendment to § 4(c)(8) permitted bank holding companies to engage in any activities closely related to activities generally engaged in by banks." [37]

Petitioner makes much of the fact that in its deliberations relating to this expansion Congress considered changing the "closely related to the business of banking" test to one of "functionally related to banking." (Petitioner's Br. at 14.) It appears that most legislators believed that the words "closely related" and "functionally related" were not significantly different.[38] During con-

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[37] *ICI II*, 450 U.S. at 78 n.51.

[38] H. Rep. No. 387, 91st Cong., 1st Sess. 22 (1969) (additional views of Reps. Patman, Barrett, Sullivan, Reuss, Moorehead, St Germain, Gonzales, Minish, Annunzio, Hanley, Abel, Brasco, and Chappell); 116 Cong. Rec. 42,432-37 (1970) (remarks of Sen. Bennett); *id.* at 42,432-33 (remarks of Sen. Sparkman). In the Conference Committee report, Representative Patman, joined by three of the six other House conferees, suggested that the "functionally related" standard might be broader than the "closely related" standard ultimately adopted. H.R. Conf. Rep. No. 1747, 91st Cong., 2d Sess. 21 (1970). This view contradicted Representative Patman's own earlier statements on the subject. H.R. Rep. No. 387, 91st Cong., 1st Sess. 22 (1969). Some legislators believed that the "closely related" formulation was even more flexible than the "functionally related test." 116 Cong. Rec. 42,433 (1970). In sum, there was, as this Court noted in *ICI II*, 450 U.S. at 78, some confusion, as to the precise meaning of the difference in language but the congressional intent is clear at least to expand permissible activities to those closely related to banking generally.

gressional consideration of the 1970 Amendments, the Board also agreed that the difference was not significant and expressed the view that the formulation used did not matter so long as it was made clear that the Act did not require a direct and significant connection between the "closely related" activity and the business of the holding company's bank subsidiary.[39] Congress thereupon altered the statute so that the Board need only find a close relationship to activities generally engaged in by banks and then retained the closely related language. Nothing in this legislative history suggests—even remotely—that the Board should not consider functional relationships as one factor in determining whether an activity is closely related to banking.

In any event, petitioner's entire argument assumes that the securities brokerage business is not itself a banking activity. However, section 16 of the Glass-Steagall Act affirmatively added brokerage to the express powers of national banks contained in 12 U.S.C. § 24. Petitioner's own reading of section 16 establishes that securities brokerage is a banking activity at least for all bank customers.[40] Even if the brokerage activity permitted by section 16 were somehow limited to bank customers, there is no reason why a bank holding company may not offer a proper banking service to a wider audience. Most bank holding company services are offered to the public at large and not merely to bank customers, and that is what the Bank Holding Company Act intends.[41] The Board had ample reason to justify service to a wider audience here.

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[39] H.R. Rep. No. 1747, 91st Cong., 2d Sess. 16 (1970) (statement of former Board Chairman Arthur Burns).

[40] In fact, section 16 is not so restricted. *See* text at 38-41 *infra*.

[41] The Bank Holding Company Act in its present form has special provisions for affiliate activities that support or service subsidiary bank activities. 12 U.S.C. § 1843(c)(1)(C). Section 4(c)(8) in contrast governs holding company activities dealing

In sum, the Board clearly applied an appropriate test in determining that brokerage activity was closely related to banking. The Board carefully examined the complex of relationships between Schwab's activities and the activities traditionally performed by banks, finding (1) that banks have in fact provided a variety of brokerage services, (2) that Schwab's brokerage services are "operationally and functionally very similar" to the brokerage and other securities activities of banks, and (3) that banking organizations are well equipped to provide these services. (129A.)[42] In other portions of its order, the Board noted the likelihood of customer convenience and transactional efficiencies that would result from BankAmerica's operation of the business. (134A-136A.)

The courts have consistently held that the Board may examine these factors.[43] The Board has done so for many years.[44] Although petitioner now proposes a different test in this Court,[45] even petitioner urged virtually identical

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with the general public. 49 Fed. Reg. 794, 807-08 (Jan. 5, 1984) (to be codified at 12 C.F.R. § 225.22); *see National Courier*, 516 F.2d at 1239. The Bank Holding Company Act was amended in 1970 to make clear that affiliates were not limited to supporting the business of the subsidiary bank. *See* text at 20 *supra*. This change embodies the concept that bank holding companies will deal with a public other than the bank's customers. The same conclusion follows from the "*public* benefits" test of section 4(c)(8), which on its face contemplates that bank holding companies will engage in activities with the public.

[42] The Board did not approve the application, as petitioner suggests, merely upon a finding of functional similarity. (Petitioner's Br. at 15, 18.) *See* text at 13-14 *supra*.

[43] *See* note 33 *supra*.

[44] Adoption of petitioner's proposed standard would call into question years of prior administrative practice during which the Board has not employed the tests urged by petitioner.

[45] Others have proposed to Congress changes to the "closely related" test that are similar to that advocated to this Court by petitioner. Bills have been proposed to limit bank holding company activities to those "so closely and directly related to banking . . . as

standards in arguing to the Board.[46] Application of the closely related test lends itself to the exercise of discretion by the agency based on its considerable expertise in banking matters.[47] The court below was clearly correct in concluding that the Board's determination was appropriate and well within its discretion.

II. THE GLASS-STEAGALL ACT DOES NOT PROHIBIT A BANK AFFILIATE FROM PROVIDING BROKERAGE SERVICES.

The Glass-Steagall Act was enacted in 1933 to address problems which Congress believed had been caused by excessive speculation and underwriting activities by banks in earlier years.[48] The Act did not bar banks and bank affiliates from all aspects of the securities business, and they have continued to engage in a broad spectrum of

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to be a proper *and necessary* incident thereto." H.R. 2856, § 6(a), 96th Cong., 1st Sess. (1979) (emphasis added); S. 39, § 301(a), 96th Cong., 1st Sess. (1979); S. 72, § 301(a), 95th Cong., 1st Sess. (1977); S. 2721, § 301(a), 94th Cong., 1st Sess. (1975). Congress has not adopted these proposals.

[46] Before the Board petitioner relied on the *National Courier* standards and argued that banks' brokerage activities were not "operationally or functionally similar" to the brokerage business.

> "As we shall demonstrate below, [BankAmerica] has failed to meet its burden with respect to the *National Courier* tests. Banks have neither generally engaged in the activities which Schwab conducts, nor have they generally engaged in activities that are operationally or functionally similar to those of Schwab."

Post Hearing Brief of the Securities Industry Association at 21-22, 36-48 (citations omitted). It was not until the Board ruled against petitioner under the tests petitioner advocated that petitioner first argued for a "facilitation" requirement.

[47] As this Court has stated, "[t]he Board's determination of what activities are 'closely related' to banking is entitled to the greatest deference." *ICI II*, 450 U.S. at 56.

[48] *See, e.g., ICI II*, 450 U.S. at 61-62; *Investment Co. Institute v. Camp ("ICI I")*, 401 U.S. 617, 629-30 (1971).

securities activities.[49] Examination of the Act's specific provisions is essential to a determination of whether any particular activity exceeds the bounds of the Glass-Steagall Act and here reveals the correctness of the Board's decision.

A. Section 20 Is the Only Relevant Statutory Provision and Permits a Bank Affiliate To Provide Brokerage Services.

Section 20 is the only provision of the Glass-Steagall Act that deals directly with the securities activities of bank holding companies and their nonbank subsidiaries. Section 20 prohibits affiliates of Federal Reserve System member banks from engaging "principally" in the "issue, flotation, underwriting, public sale, or distribution at wholesale or retail, or through syndication," of securities.

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[49] Petitioner cites *ICI II* for the proposition that "[t]hrough the Glass-Steagall Act, Congress meant to separate depository institutions from the securities business 'as completely as possible.'" (Petitioner's Br. at 20.) In fact, as the Board noted (152A), what this Court said Congress meant to separate was "commercial from investment banking," the latter term plainly referring to the "underwriting field." 450 U.S. at 70. Indeed, in *ICI II* the court of appeals was reversed precisely because it carried too far the separation of bank affiliates from the securities business. *Id.* at 54.

Petitioner's references to remarks made by Representative Kopplemann during the House debates on the Glass-Steagall Act are similarly misleading. (Petitioner's Br. at 20-21.) In context, it is quite clear that Representative Koppelmann was concerned about "the undue diversion of bank funds into speculative operations," 7 Cong. Rec. 3907 (1933), and used the term "brokerage" to refer to the promotion and sale of securities by banks, not brokerage transactions in which banks act as agent for customers. Use of the term "brokerage" loosely to encompass "dealing" and "underwriting" is not unusual, as both the Board (152A) and this Court have noted. *See Board of Governors v. Agnew*, 329 U.S. 441, 445-46 (1947). *See also* N. Moore, *Dictionary of Business, Finance and Investment* 59 (1976) ("brokerage house" refers to "[a]ny firm whether acting as broker or dealer, which assists in securities trading").

BankAmerica's acquisition of Schwab has made Schwab a bank affiliate within the meaning of the Glass-Steagall Act,[50] and the acquisition could be found to violate section 20 only if Schwab is "engaged principally" in any of the activities expressly listed therein.

Schwab's principal activity is buying and selling securities as agent for its customers and not for its own account. Petitioner has, throughout this proceeding, conceded that these activities do not constitute the "issue," "flotation," "underwriting," or "distribution" of securities. (*See, e.g.*, Petitioner's Br. at 7, 10, 35.) As the Board concluded, and the Court of Appeals affirmed, Schwab's brokerage activities also do not constitute the "public sale" of securities.

Interpretation of section 20 necessarily begins with an analysis of its language.[51] Significantly, section 20 does not include "brokerage," the generic term used for buying and selling securities as agent for a customer.[52] Nor does section 20 otherwise refer to the activities of purchasing and selling securities on the order and for the account of customers. Rather, the section refers to the "issue, flotation, underwriting, public sale, or distribution" of securities, the investment banking activities with

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[50] Section 2(b) of the Glass-Steagall Act, 12 U.S.C. § 221a(b) (1982), defines a bank "affiliate" as, *inter alia*, any entity under common control with a bank. Bank of America NT&SA, a member bank, is BankAmerica's principal subsidiary; any other majority-owned subsidiary of BankAmerica is thus an affiliate of a member bank.

[51] *See, e.g., North Dakota v. United States*, 103 S. Ct. 1095, 1102 (1983); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982).

[52] 2 L. Loss, *Securities Regulation* 1215 (2d ed. 1961) (a "broker" executes an order for securities as agent of his customer; a "dealer" in securities acts for his own account and not as agent for the customer).

which the Glass-Steagall Act is primarily concerned.[53] The term "public sale" has been used both to describe underwriting activities[54] and synonymously with "public offering," a term that plainly connotes underwriting rather than brokerage activities.[55]

Interpreting section 20 to exclude brokerage also gives effect to the familiar principle of statutory construction providing that words grouped in a list should normally be given related meaning.[56] The terms "issue," "flotation," "underwriting," and "distribution" in sections 20 and 32 are generally synonomous and all involve the marketing to the "public" of newly issued stock or of large blocks of securities previously privately held.[57] It

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[53] *See, e.g., ICI II*, 450 U.S. at 61-62; *ICI I*, 401 U.S. at 629-30.

[54] *See, e.g., Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 758 (1975) (Powell, J. concurring) (describing "customary public sale" of securities as one involving marketing of issues "through underwriters and dealers, often including scores of investment banking and brokerage firms" where offers are made to "countless persons whose identities cannot be known"). *See also* 1 L. Loss, *Securities Regulation* 551 (2d ed. 1961).

[55] *See, e.g., Spector v. LQ Motor Inns, Inc.*, 517 F.2d 278, 282-83 (5th Cir. 1975), *cert. denied*, 423 U.S. 1055 (1976) (using "public sale" interchangeably with "public offering" by issuer of its own stock); *Steinberg v. Carey*, 439 F. Supp. 1233 (S.D.N.Y. 1977); *Kupferman v. Consolidated Research & Mfg. Corp.*, [1961-1964 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,197 (S.D.N.Y. Dec. 19, 1962); *SEC v. Arvida Corp.*, 169 F. Supp. 211 (S.D.N.Y. 1958); SEC Securities Act Release No. 3844, 22 Fed. Reg. 8359 (1957).

[56] *See, e.g., Third National Bank v. Impac, Ltd.*, 432 U.S. 312, 322 (1977); *General Electric Co. v. Occupational Safety & Health Review Commission*, 583 F.2d 61, 65 (2d Cir. 1978).

[57] The Court of Appeals explained that the terms "issue," "flotation," "underwriting," and "distribution" included activities "in which the dealer trades as principal for his own profit," whereas brokerage refers to agency rather than principal activities. (161A.) Petitioner challenges that analysis claiming that the term underwriting includes "best efforts" underwriting, which occurs when an underwriter, instead of buying an issue from the issuer and

is highly unlikely that, in the midst of words describing activities generically different from brokerage, Congress would have used the words "public sale" to refer to brokerage. This is particularly true where Congress used words that unmistakably describe brokerage activities elsewhere in the Act. The term "public sale" in section 20 stands in sharp contrast to the language in section 16 of the Act which expressly authorizes banks to engage in the "purchasing and selling of securities . . . without recourse, solely upon the order, and for the account of, customers."

The Board's holding that Schwab's brokerage activities do not constitute the "public sale" of securities is further supported by its longstanding interpretation of the same words in section 32 of the Glass-Steagall Act. Section 32 prohibits managerial or other interlocks between member banks and any entity

> "primarily engaged in the *issue, flotation, underwriting, public sale, or distribution*, at wholesale or

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reselling it as principal, sells it for the issuer as agent. (Petitioner's Br. at 38-39.) Petitioner cites no authority for the proposition that the term underwriting as used in the Glass-Steagall Act was intended to include best efforts underwriting. Indeed, in the words of the leading commentator cited by petitioner, best efforts underwriting is "not really underwriting, it is simply merchandising." 1 L. Loss, *Securities Regulation* at 172. *See also Quinn & Co. v. SEC*, 452 F.2d 943, 946 (10th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972) ("The term underwriter is . . . a word of art. An underwriter is one *who purchases stock from the issuer* with an intention to resell it to the public.") (emphasis added); *Dale v. Rosenfeld*, 229 F.2d 855, 857 (2d Cir. 1956) (commonly understood meaning of the word "underwriting" does not include best efforts underwriting). In any event, the activities of a best efforts underwriter are markedly different from those of a broker such as Schwab. Best efforts underwriters undertake to sell blocks of securities on behalf of issuers and thus have a "salesman's interest" in the promotion of the particular securities they are trying to sell. Brokers that merely execute orders at the direction of their customers have no similar interest. *See* note 65 *infra*.

retail, or through syndicate participation, of stocks, bonds, or other similar securities." [58]

In January 1936, shortly after section 32 was revised in the Banking Act of 1935, the Board ruled that "[a] broker who [is] engaged solely in executing orders for the purchase and sale of securities on behalf of others in the open market is not engaged in the business referred to in Section 32." 22 Fed. Res. Bull. 51 (1936). The Board's regulations have carried that interpretation forward, without change for almost 50 years.[59] Since both sections 32 and 20 contain the same language, were enacted for the same general purpose, are part of the same statute, and deal with the same subject matter, the Board's longstanding interpretation of "public sale" in section 32 to exclude brokerage activities applies with equal force to the same term in section 20. *See Northcross v. Board of Education*, 412 U.S. 427, 428 (1973).

The Board's construction of the term "public sale" was implicitly adopted by this Court in *Board of Gover-*

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[58] 12 U.S.C. § 78 (emphasis added).

[59] *See* 12 C.F.R. § 218.1 (1983). Petitioner urges this Court to ignore (and implicitedly overrule) the Board's interpretation here solely because it claims that "there is no indication that the Board's construction of Section 32 was ever brought to Congressional attention, let alone that it led to Congressional action." (Petitioner's Br. at 40 n.72.) That contention is erroneous. As originally enacted in 1933, section 32 prohibited interlocks between a member bank and a firm primarily engaged in the business of "purchasing, selling, or negotiating securities." Banking Act of 1933, Pub. L. No. 73-66, 48 Stat. 162, 194. In the Banking Act of 1935, ch. 614, 49 Stat. 684, 709, Congress revised section 32 in order to make the description of securities activities parallel to that contained in section 20. *See* H.R. Rep. No. 742, 74th Cong., 1st Sess. 17 (1935). Congress had previously been advised that the Board interpreted section 32 as covering only "the underwriting and distribution of securities," 1934 Annual Report of the Federal Reserve Board 53 (1935), and in no way indicated any desire to reach brokerage activities when it used the term public sale.

nors v. Agnew, 329 U.S. 441 (1947).[80] That case involved two directors of a national bank who were also employees of a securities firm which derived approximately 32 percent of its gross income from underwriting, and 47 percent from brokerage. The Board ruled that the directors' outside firm was "primarily engaged" in activities covered by section 32—namely, underwriting—and it ordered the directors to resign from the bank. On review, the court of appeals set aside the Board's order on the ground that the directors' outside firm earned less than half of its revenue from underwriting.[81] This Court reversed and reinstated the Board's order, holding that a firm is "primarily" engaged in a prohibited activity if it is "substantially" so engaged. If the statutory language "issue, flotation, underwriting, public sale, or distribution" had been thought to encompass not only underwriting but brokerage as well, it would have been unnecessary for the Court to construe the meaning of "primarily engaged," since the directors' outside employer was, under any interpretation of the term, "primarily engaged" in underwriting and brokerage taken together.[82]

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[80] *See also ICI II* where this Court referred to the same language in section 20 itself as "prohibit[ing] national banks or state bank members of the Federal Reserve System from owning securities affiliates . . . that are 'engaged principally' in the *issuance or underwriting of securities*." 450 U.S. at 59 n.24 (emphasis added). This Court also construed identical language in section 19(e) of the Glass-Steagall Act, Pub. L. No. 73-66, 48 Stat. 162, 188 (1933), which has since been repealed in pertinent part, Pub. L. No. 89-485, 80 Stat. 236, 242 (1966), as meaning "the issuance or underwriting of securities." *Id.* at 59 n.24, 69 n.43.

[81] *Agnew v. Board of Governors*, 153 F.2d 785 (D.C. Cir. 1946), *rev'd*, 329 U.S. 441 (1947).

[82] Petitioner attempts to avoid the clear import of this Court's *Agnew* decision by asserting that this Court "did not, and did not have to, address the question of whether . . . the term 'public sale' " included brokerage activity. (Petitioner's Br. at 40.) However, this Court did note separately the percentages of income the firm derived from the brokerage business and from the underwriting

Even if the meaning of the statutory language were open to reasonable differences of opinion, the Board's reading of the term "public sale" in sections 20 and 32 as not encompassing brokerage should be dispositive where, as here, it is fully consistent with the purposes of the Glass-Steagall Act.[23] As this Court explained in *ICI II*, the Glass-Steagall Act was enacted to protect the public against bank losses that might result from participation in securities underwriting and speculative or manipulative market-making activities:

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field. 329 U.S. at 445. Moreover, in distinguishing between the firm's underwriting and brokerage businesses, this Court went so far as to define "the underwriting field" in terms identical to that used in sections 20 and 32:

> "The issue, flotation, underwriting public sale or distribution, at wholesale or retail or through syndicate participation, of stocks, bonds, or other similar securities."

Id. at 445 n.3. The majority and dissenting judges in the court of appeals in *Agnew* likewise thought it plain that the language "issue, flotation, underwriting, public sale, or distribution" of securities did not encompass brokerage activity. *Agnew v. Board of Governors*, 153 F.2d at 787 n.3, 790; *id.* at 796 (Edgerton, J., dissenting). Indeed, the majority opinion emphasized that "[u]nderwriting and brokerage, although both concerned with securities, are vastly different operations." *Id.* at 790.

[23] The Board has responsibility for administering sections 20 and 32 of the Glass-Steagall Act, and its determination that BankAmerica's application did not violate the Act is, like its determination under section 4(c)(8) of the Bank Holding Company Act, entitled to deference. Contrary to petitioner's suggestion (Petitioner's Br. at 43), the fact that the Board has no rulemaking authority under relevant provisions of the Glass-Steagall Act does not affect the deference due its interpretation. As the Court of Appeals noted, the Board has both "primary responsibility for implementing the Glass-Steagall Act and expert knowledge of commercial banking." (160A.) *See ICI II*, 450 U.S. at 56-57 n.21 (Board's " 'judgment should be conclusive upon any matter which . . . is open to reasonable difference of opinion' "), *quoting Board of Governors v. Agnew*, 329 U.S. at 450 (Rutledge, J. concurring) (construing the Glass-Steagall Act).

> "It is familiar history that the Glass-Steagall Act was enacted in 1933 to protect bank depositors from any repetition of the widespread bank closings that occurred during the Great Depression. Congress was persuaded that speculative activities, partially attributable to the connection between commercial banking and investment banking, had contributed to the rash of bank failures. The legislative history reveals that securities firms affiliated with banks had engaged in perilous underwriting operations, stock speculation, and maintaining a market for the bank's own stock, often with the bank's resources." [84]

As the Board found (151A-153A), the agency services provided by discount brokers simply do not present the risks that concerned Congress when it enacted the Glass-Steagall Act.[85]

B. A Comprehensive Reading of the Glass-Steagall Act Is Fully Consistent With a Bank Affiliate's Providing Brokerage Services.

Petitioner attempts to support its interpretation of section 20 by an elaborate argument that the Board's read-

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[84] 450 U.S. at 61-62 (footnotes omitted); *see ICI I*, 401 U.S. at 629-30.

[85] The primary risk associated with underwriting arises from the fact that, from the time an underwriter is committed to purchase an issuer's securities at one price until the same securities are delivered in sales to the public at what is anticipated to be a higher price, the underwriter's own capital is at risk to market movements. These concerns are simply not relevant to Schwab's brokerage activities. Schwab does not buy or sell securities for its own account and therefore does not assume the capital risks of an underwriter. Nor does Schwab have a "salesman's interest" in promoting particular securities to its customers. Its profit is derived solely from the commissions it receives for executing the purchase and sale orders initiated by its customers (without advice from Schwab) and from charges paid by those customers for the incidental services Schwab provides. *See, e.g.*, 2 L. Loss, *Securities Regulation* at 1215 (a broker "has no beneficial interest in the transaction except the commission . . . he receives for his services").

ing of "public sale" in sections 20 and 32 is inconsistent with other sections of the Act. According to petitioner, two other sections applicable to banks—sections 16 and 21—bar "any direct bank involvement" in brokerage, and this bar should be applied to bank holding companies and their nonbank affiliates in order to provide a "comprehensive" interpretation of the statute. (Petitioner's Br. at 35.) Even if petitioner were correct that sections 16 and 21 preclude banks from providing brokerage services to the general public—and we show below they do not [66]—that conclusion would have no bearing on the decision in this case.[67] This Court has expressly held that "bank affiliates may be authorized to engage in certain activities that are prohibited to banks themselves." [68]

Petitioner attempts to avoid this prior ruling by arguing that the different statutory provisions governing

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[66] Although petitioner repeatedly refers to sections 16 and 21 (Petitioner's Br. at 34-42), its argument rests almost entirely on an interpretation of section 16. (*See* Petitioner's Br. at 20-34.) To the extent petitioner argues that the word "selling" in section 21 encompasses brokerage activities it is incorrect. In context, the word "selling," like "public sale" in section 20, was intended to refer to underwriting activities, not brokerage. The Board's interpretation of section 20 is thus fully consistent with sections 16 and 21 and provides for a fully comprehensive interpretation of the Act.

[67] Petitioner acknowledges the Board's consistent interpretation of sections 20 and 32 as not encompassing brokerage, but nonetheless claims that "[t]here is no reason . . . why only two sections of the Act (20 and 32) should be viewed in isolation from the remaining sections (16 and 21)." (Petitioner's Br. at 40 n.72.) The reasons are quite plain: Sections 20 and 32 refer to precisely the same activities—namely, the "issue, flotation, underwriting, public sale or distribution" of securities. The language in section 16, which governs banks, is markedly different and should be interpreted accordingly.

[68] *ICI II*, 450 U.S. at 60; *see id.* at 59 n.24 ("[T]he structure of the Act reveals a congressional intent to treat banks separately from their affiliates."); *Board of Governors v. Agnew*, 329 U.S. at 447-48 ("Congress by the words it chose marked a distinction which we should not obliterate.").

bank affiliates relate only to the permitted *level* of securities activity allowed the affiliates, not to the *substance* of those activities. (Petitioner's Br. at 38.) Thus, petitioner contends that a bank affiliate can only engage "principally" in securities activities expressly permitted banks. However, petitioner offers no support for this theory, one which it has before argued without success in this Court.[69]

Petitioner's theory is contradicted by express statutory provisions which permit bank affiliates to engage in activities specifically prohibited to banks.[70] Moreover, the theory simply does not make sense.[71] In the Glass-Steagall Act, Congress determined to permit bank holding companies to engage in a non-principal way in specific activities wholly forbidden to banks—for example, underwrit-

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[69] *See* Brief of *Amicus Curiae* Securities Industry Association in Support of Respondent, at 21, *ICI II*. Petitioner argued in *ICI II* that "[s]ince Congress intended to prohibit banks from operating closed- as well as open-end investment companies. Section 20 logically must be read to prohibit bank affiliates from operating closed- as well as open-end investment companies." *Id.* This Court declined to adopt petitioner's approach. *See ICI II*, 450 U.S. at 64.

[70] For example, section 16 of the Glass-Steagall Act, prohibits a bank from purchasing "for its own account . . . any shares of stock of any corporation." 12 U.S.C. § 24 (Seventh). Bank holding companies and their nonbank subsidiaries on the other hand, are expressly permitted to own the stock of subsidiaries engaged in various authorized activities and to purchase the stock of other companies of any kind as long as the holding does not exceed 5 percent of any issuer's outstanding voting securities. 12 U.S.C. § 1843 (c)(6) (1982).

[71] Given the statutory language, petitioner must concede that section 16 does not prohibit all brokerage services, *i.e.*, it permits at the very least brokerage services as an accommodation to bank customers. Yet, if petitioner's interpretation were correct and "public sale" were construed to mean "brokerage," the result would be that banks could, pursuant to section 16, engage in brokerage, while bank holding companies could not, under section 20, engage "principally" in *permissible* bank activity—a result that would turn congressional intent on its head.

ing—because it rightly concluded that those activities did not present the same risks when carried out through structurally and organizationally separate affiliates. The same rationale would certainly permit bank affiliates to engage in permissible activities in ways that banks cannot.

Petitioner nonetheless devotes a substantial portion of its brief to trying to establish that under section 16 banks may engage only in limited "accommodation" brokerage activities—that is, the provision of brokerage services as an accommodation to pre-existing bank customers.[73] (*See* Petitioner's Br. at 20-31.) Petitioner bases this assertion primarily on one paragraph in the 1933 Annual Report of the Comptroller of the Currency. That report noted that newly enacted section 16, as originally drawn, permitted banks to engage in brokerage with respect to investment securities, but not stock, and recommended that the statute be amended to add the term "stock" explaining:

> "It would appear from the language that a national bank is prohibited from performing the service of purchasing or selling corporate stocks for the account of one of its customers. Since this does not entail investment by the bank of its own funds and the bank merely acts in an accommodation capacity, it is believed that it was not the intention of Congress to penalize the public located in communities removed from the money centers in disposing of or

[73] In effect, petitioner is attempting to argue the issues it has raised in a different proceeding against the Comptroller. In *Security Pacific Nat'l Bank*, [1982-1983 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 99,284 (O.C.C. Aug. 26, 1982), the Comptroller ruled that section 16 does not so limit national banks in the brokerage services they may provide. The district court affirmed that ruling insofar as it is relevant here, *Securities Indus. Ass'n v. Comptroller of the Currency*, 577 F. Supp. 252 (D.D.C. 1983), and the decision is now on appeal to the Court of Appeals for the District of Columbia Circuit, Nos. 84-5026 and 84-5085 (D.C. Cir., filed Feb. 9, 1984).

purchasing securities in the form of corporate stocks for investment purposes." [73]

Petitioner speculates that the Comptroller's reiteration of the word "accommodation" in his testimony before the House and Senate Committees [74] resulted in a congressional understanding that if section 16 were amended to provide for brokerage of corporate stock, banks would thenceforth be limited to providing brokerage as an accommodation to pre-existing customers.[75] (Petitioner's Br. at 24-25.)

Petitioner elevates the Comptroller's concern about an oversight in the legislative process (which would redound to the particular detriment of investors in rural areas) into an effort to persuade Congress to abandon its clearly expressed intention to permit banks to continue to engage in brokerage activities as they had before passage of the Act.[76] If Congress had been concerned that the addition

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[73] 1933 Annual Report of the Comptroller of the Currency 11 (1934).

[74] *Hearings on H.R. 5357 Before the House Comm. on Banking and Currency*, 74th Cong., 1st Sess. 154-55, 663 (1935) (statement of J.F.T. O'Connor).

[75] There is no reason to believe that use of the term "customer" in either the legislative history or the statute was intended to limit a bank's potential brokerage clients. Rather, as a plain reading of the statute makes clear, the term was meant to distinguish permissible brokerage activities from securities activities undertaken by banks "for their own account," which were prohibited. Indeed, it is difficult to understand—and petitioner never explains—why either the policies underlying the Glass-Steagall Act or the reasons underlying the Comptroller's call for amendment to the statute would be served by a pre-existing customer limitation.

[76] *See* text at 40-41 *infra*. The Comptroller's own actions are inconsistent with petitioner's view. As petitioner notes, the Comptroller in a letter to the national bank examiners permitted national banks "to purchase and sell stocks solely upon the order and for the account of customers" after the passage of the 1933 Act but before the 1935 amendments. (Petitioner's Br. at 23-24.) If the

of stock to the provisions of section 16 called for some modification of bank brokerage business, the legislative history would surely have suggested as much. Yet neither the House nor Senate Report, nor any floor comment reflects such concern, and the word "accommodation" appears only in the Comptroller's testimony and then with no elaboration or particular indication of significance.[77]

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power of banks to engage in brokerage with respect to stock were as controversial as petitioner suggests, neither the Comptroller nor the Board, *see* note 77 *infra*, would have been likely to adopt such a position without further deliberation, if at all.

Petitioner's reference (Petitioner's Br. at 24) to a statement in the Comptroller's letter to the effect that banks may not engage in the brokerage business is without substantive significance. The Comptroller's letter was expressly concerned with regulating the commissions banks would charge for brokerage service and sought to prevent banks from realizing a profit by restricting those charges to cost. In that connection, the Comptroller stated that while national banks could act as agents for the purchase and sale of stock, "[t]his does not mean that national banks may do a brokerage business *and any charge must not exceed the actual cost of servicing.*" "National Banks May Buy and Sell Stocks," Am. Banker, July 10, 1934, at 1, col. 3 (the italicized portion was excluded from the quotation in petitioner's brief) (reprinting Comptroller's letter). The language in the letter supports the view that it represents prudential regulation rather than statutory construction. Section 16 on its own terms refers to the "business of dealing in investment securities," and thereby permits banks to charge commissions. Moreover, there is no reason to believe that the statement referring to brokerage in the letter was ever brought to Congress' attention.

[77] Petitioner incorrectly suggests that the Board adopted the "accommodation" restriction on brokerage activities of banks. (Petitioner's Br. at 24.) In the Federal Reserve Bulletin petitioner cites, the Board independently ruled that state member banks which are subject to section 16's requirements, 12 U.S.C. § 335, could provide brokerage services with respect to stock as well as investment securities. In so doing, the Board *never* used the word accommodation, nor did it adopt any restrictions petitioner urges this Court to read into the statute. *See* 20 Fed. Res. Bull. 609 (1934). *See also* 1935 Annual Report of the Board of Governors of the Federal Reserve System 56 (1936). What the Board did do was to note without comment in the last paragraph of its statement the similar inter-

In fact, the 1935 amendments were widely viewed as effecting "technical" and not "substantive" change in the 1933 Act, an interpretation wholly inconsistent with the notion of congressional concern.[78]

Petitioner also relies (Petitioner's Br. at 28) on an administrative ruling issued by the Comptroller in 1936 which limited national banks to providing brokerage services, at cost, "to actual customers of the bank, which customer relationship exists independently and apart from the particular [securities] transaction" involved.[79] But that ruling was not based on any requirement stated in section 16 and did not address any matter of concern brought to Congress' attention before the passage of the Act in 1933 or its amendment in 1935. Instead, as later Comptrollers recognized, the ruling was prudential only, reflecting "the great caution of banking regulations in the years immediately following the 1931-2 debacle" and has accordingly been abandoned.[80]

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pretation by the Comptroller and his accompanying statement that "[t]his does not mean that national banks may do a brokerage business and any charge must not exceed the actual cost of servicing." 20 Fed. Res. Bull. 609. But, as noted above, *see* note 76 *supra*, that reference to the brokerage business related only to prudential price regulation.

[78] *See* H.R. Rep. 742, 74th Cong., 1st Sess. 2 (1935) ("amendments make no fundamental changes in the existing banking laws"); *id.* at 1-2 ("purpose of the amendment is to clarify that national banks may purchase and sell stock for the account of their customers, but not for their own account").

[79] 1 *Bulletin of the Comptroller of the Currency*, No. 2, at 2 (Oct. 26, 1936).

[80] *Bank Automatic Investment Services*, [1973-1978 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 96,272, at 81,360 (June 10, 1974) (Letter from Comptroller James E. Smith to G. Duane Vieth). *See New York Stock Exchange v. Smith*, 404 F. Supp. at 1097 (early interpretations "embodied an overcautious approach to bank regulation reflecting the atmosphere of the years immediately after the 1929 market crash rather than the legisla-

Whatever the import of the Comptroller's early actions, the "accommodation" theory is not supported by the plain reading of the statute, which empowers a bank to engage "in the *business* of dealing in securities and stock" by purchasing and selling "upon the order, and for the account, of customers and in no case for its own account." Section 16 on its face in no way limits bank brokerage activities to "accommodation" relationships. Indeed, the express prohibitions of section 16—that a bank shall not trade securities "for its own account" and "shall not underwrite any issue of securities or stock"—are wholly inapplicable to brokerage activities.[21]

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tive history"). In 1957, the Comptroller modified the restrictive ruling adopted in 1936. Comptroller of the Currency, *Digest of Opinions* ¶ 220A (1957). In 1963, when the Comptroller's *Digest of Opinions* was superseded by the Manual for National Banks, all provisions limiting the securities brokerage activities of national banks were omitted entirely, and, in 1974, the prior restrictive rulings were expressly repudiated. *See Bank Automatic Investment Services*, at 81,360. This change in regulatory approach is wholly consistent with the well established proposition of administrative law, recently confirmed by this Court, requiring that agencies "be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances,'" consistent with their duty to regulate in the public interest. *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Insurance Co.*, 103 S. Ct. 2856, 2866 (1983), *quoting Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968). *See, e.g., American Trucking Ass'n v. Atchison, T. & S. F. Ry.*, 387 U.S. 397, 416 (1967) (Agencies "are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.")

[21] Petitioner also argues that the "without recourse" requirement of section 16 limits banks in the form of brokerage services they may provide. Relying on language in *Awotin v. Atlas Exch. Nat'l Bank*, 295 U.S. 209 (1935), to the effect that the term "without recourse" should not be confined to its "technical commercial definition," petitioner claims that banks, in performing brokerage services, must avoid entirely the risk of liability to third-party purchasers or sellers, which, according to petitioner, can only be accomplished if banks pass orders from their customers along to a broker for execution pursuant to an arrangement under which the

The legislative background and history of section 16 also suggests that there is no such limitation. Before 1933, banks were extensively engaged in brokerage activities.[82] Indeed, bank brokerage activities were so widespread that Mr. Justice Cardozo, then-Chief Judge of the New York Court of Appeals, took judicial notice of the fact: "In many banks special departments are organized for that very purpose." *Block v. Pennsylvania Exchange Bank*, 170 N.E. 900, 901-02 (N.Y. 1930).[83]

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broker looks directly to the customer for performance. (Petitioner's Br. at 31-34.) Petitioner's interpretation is without merit. In *Awotin*, a bank had executed an agreement with a customer *to repurchase certain bonds at their original price, plus interest*, thereby assuming a risk identical or even greater than that it would have assumed if it had made or endorsed an instrument in accordance with the customary definition of "recourse." That the assumption of such a risk does not escape the "without recourse" limitation hardly suggests, as petitioner argues, that that limitation is violated by the mere possibility that a bank could suffer loss if a customer defaulted on a purchase or sale order if the market moved against the customer's position in the short time between the order date and the settlement date, and if the bank could not recover on the claim it would have against its customer. (Petitioner Br. at 31-34). The risk that a customer will not perform his obligations is hardly unique to brokerage services and hardly one that the Glass-Steagall Act could be said to guard against. Indeed, the risk that a bank may lose money because of a customer default at settlement of a brokerage transaction (where the bank has the securities or the proceeds in hand) is less than the risk a bank faces virtually every time it makes a loan to a customer—an activity indisputably permitted to banks. Contrary to petitioner's claim, the reading of the statutory limitation that is most consistent with the purpose of the Glass-Steagall Act is the one adopted by the Board below: a bank trades "without recourse" when—like Schwab, but unlike the bank in *Awotin*—it makes no warranty as to the quality of the investment. (151A.)

[82] *See generally* A. Fiske, *The Modern Bank* 154 (1918); L. Langston & N. Whitney, *Banking Practice* 309 (1921); R. Westerfield, *Banking Principles and Practice* 508-09 (1924) (describing customer securities or bond departments).

[83] *Accord New York Stock Exchange v. Smith*, 404 F. Supp. at 1036 ("Prior to the passage of the Glass-Steagall Act, banks par-

Banks did not limit provision of these services to their customers; rather, brokerage services were provided to "the public in general." [84] And brokerage services were offered with respect to stock as well as investment securities.[85]

If these activities gave rise to congressional concern, that concern is nowhere evident in the legislative history of the Glass-Steagall Act. To the contrary, in the one clear reference to bank brokerage activity appearing in the entire legislative history preceding passage of the Act, Senator Glass explained that under section 16, "[n]ational banks are to be permitted to purchase and sell investment securities for their customers *to the same*

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chased and sold securities for the accounts of customers . . ."). *See, e.g., Dyer v. Broadway Central Bank*, 169 N.E. 635 (N.Y. 1930); *Matousek v. Bank of Europe Trust Co.*, 255 N.Y.S. 150 (App. Div. 1932); *Brooklyn National Bank v. Keystone Bond & Mortgage Co.*, 268 N.Y.S. 485 (Sup. Ct. 1933); *Le Marchant v. Moore*, 44 N.E. 770 (N.Y. 1896); *Central National Bank v. White*, 34 N.E. 1065 (N.Y. 1893). New York banks were by no means unique. Courts throughout the nation upheld the power of banks to deal in securities as agents. *Klein v. Realty Board Investors*, 192 N.E. 867 (Ohio Ct. App. 1934); *Clucas v. Bank of Montclair*, 166 A. 311 (N.J. 1933); *Citizen's National Bank v. Ratcliff & Lanier*, 253 S.W. 253 (Tex. App. Comm'n 1923). This Court recognized that a national bank had the power to purchase bonds at the request of its customers. *Blakey v. Brinson*, 286 U.S. 254 (1932). *See also Boone v. American Veterinary Medical Ass'n*, 85 F.2d 616 (6th Cir.), *cert. denied*, 298 U.S. 659 (1936); *McNair v. David*, 68 F.2d 935 (5th Cir. 1931), *cert. denied*, 292 U.S. 647 (1934); *Messick v. Rardin*, 6 F. Supp. 200 (E.D. Ill. 1934), *appeal dismissed*, 78 F.2d 643 (7th Cir. 1935); *Mark v. Westlin*, 48 F.2d 609 (D. Minn. 1931).

[84] Smith, *Stock Market Service Comes High*, Am. Bankers A.J. 965 (April 1929); *see Greenfield v. Clarence Sav. Bank*, 5 S.W.2d 708 (Mo. Ct. App. 1928).

[85] *See, e.g., Block v. Pennsylvania Exchange Bank*, 170 N.E. 900, (involving bank's purchase of corporate stock as agent); *Matousek v. Bank of Europe Trust Co.*, 255 N.Y.S. 150 (same).

extent as heretofore."[86] As the Board found (151A), the fact that the voluminous legislative history of the Glass-Steagall Act barely touches upon the scope of permissible brokerage operations reflects that Congress was not concerned with, and thus did not intend to prohibit, such activities.[87]

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[86] S. Rep. No. 77, 73d Cong., 1st Sess. 16 (1933) (emphasis added); *see* S. Rep. No. 584, 72d Cong., 1st Sess. 15 (1932) (similar language); H. Rep. No. 150, 73d Cong., 1st Sess. 3 (1933) (similar language).

[87] Petitioner's reliance (Petitioner's Br. at 25-26) on various statements by Thomas Corcoran concerning the proposed exclusion of banks from regulation under the Securities Exchange Act of 1934 is misplaced. Mr. Corcoran was not a member of Congress, and he made clear that he was expressing his personal views only on legislation dealing with the regulatory jurisdiction of the SEC, not the scope of the Glass-Steagall Act. *See Stock Exchange Practices: Hearings on S. Res. 84, 56, & 97 Before the Senate Comm. on Banking and Currency*, 73d Cong., 1st Sess. 6463 (1934).

To the extent the legislative history of the Securities Exchange Act of 1934 is at all relevant, it in fact suggests that Congress was well aware that banks were extensively involved in providing brokerage services, not that such involvement was, as petitioner claims, "severely limited." (Petitioner's Br. at 27.) In testimony on a version of the bill which did not exclude banks from the definitions of broker and dealer, one banker commented:

> "Your attention is particularly called to the definition of the words 'broker' and 'dealer.' As above explained, *banks are daily engaged 'in effecting transactions in securities for the account of others.'* . . . I assume from other portions of the bill that it is not your purpose to include banks within the definition of brokers or dealers. If this be so, I submit that these definitions should be changed, or that some specific statement should be made that banks are not included in such definition."

Stock Exchange Practices at 7222 (statement of William C. Potter, Chairman of the Board, Guaranty Trust Co.) (emphasis added). At that point, Ferdinand Pecora, counsel to the Committee, responded: "I might just interrupt to say that I think that that assumption is a sound one," *id.*, a response plainly suggesting that the exclusion of banks from provisions of the 1934 Act was based on considerations other than Mr. Corcoran's statements.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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